

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)
Closed Captioning of Internet)
Protocol-Delivered Video)
Programming: Implementation) MB Docket No. 11-154
of the Twenty-First Century)
Communications and Video)
Accessibility Act of 2010)

**Opposition to the Petitions for Temporary Partial Exemption or Limited
Waiver by the Digital Media Association (DiMA) of**

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)
National Association of the Deaf (NAD)
Association of Late-Deafened Adults (ALDA)
Hearing Loss Association of America (HLAA)
Cerebral Palsy and Deaf Organization (CPADO)
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)
California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)
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SUMMARY

Consumer Groups respectfully oppose DiMA's petitions for temporary exemption or waiver from the Commission's rendering and user controls requirements for video programming distributors ("VPDs") delivering video via Internet Protocol ("IP"). DiMA's petitions cannot be granted under the statutory provisions of the Communications Act of 1934 ("1934 Act,") as modified by the Twenty-First Century Communications and Video Accessibility Act ("CVAA").

More specifically, DiMA's petitions are procedurally irregular and improper, conflating the Commission's authority to grant categorical exemptions for classes of entities as part of a rulemaking with its separate authority to grant individual waivers to particular entities pursuant to a petition. The Commission cannot grant either a categorical exemption pursuant to a petition or an individual exemption to a class of entities.

The appropriate contexts for DiMA to seek categorical exemptions for VPDs were during the Video Programming Accessibility Advisory Committee ("VPAAC") and during the Commission's IP captioning rulemaking. DiMA did, in fact, seek to delay the Commission's implementation of the VPAAC's deadlines. But after duly considering DiMA's arguments, the Commission properly rejected them, and DiMA failed to file a timely petition for reconsideration. Accordingly, DiMA is procedurally barred from seeking a categorical exemption without initiating a new rulemaking.

Conversely, DiMA cannot seek a waiver for a class of entities under the Commission's rules for granting individual exemptions pursuant to petition. DiMA neither possesses the authority to seek an exemption on behalf of any individual VPD, nor does it provide sufficient information to demonstrate that

complying with the Commission's rendering and user controls requirements would impose an undue economic burden on any VPD.

DiMA's petitions, if granted, would severely impact the public interest by denying accessible video programming to the more than 48 million Americans who are deaf or hard of hearing and imposing particular hardship by denying necessary user controls to viewers who are deaf-blind or visually impaired. This result would undercut the CVAA's promise of equal access for all Americans, delaying the realization of an essential civil right and perpetuating inequality.

Because DiMA cannot properly justify an exemption under the Commission's individual exemption process, it necessarily cannot justify an extraordinary and unprecedented general waiver of the closed captioning rules. DiMA's petitions are wildly overbroad in any case, suggesting that no VPDs can make any device capable of complying with the Commission's rendering and user controls requirements by the Commission's deadlines, despite the fact that some of DiMA's own VPD members refuse to join its petition.

DiMA's petitions attempt to undermine the lengthy, good-faith efforts of the industry and consumer representatives on the VPAAC to agree upon workable deadlines for the IP closed captioning rules and starkly contravenes congressional intent and the letter and spirit of the Commission's rulemaking, exemption, and waiver processes. Accordingly, we urge the Commission to reject DiMA's unprecedented, bad-faith ploy to set back the progress of accessible video programming by rejecting both of its petitions with prejudice. Should DiMA's members seek to file individual petitions for limited exemptions in the future, they must do so only in the rare case that they can demonstrate concrete evidence of legitimate hardship, substantial efforts to comply with the rules, and realistic timeframes for quickly achieving compliance.

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OPPOSITION

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), the Cerebral Palsy and Deaf Organization (CPADO), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), collectively, “Consumer Groups,” and the Technology Access Program at Gallaudet University (TAP), respectfully oppose the two Petitions for Temporary Partial Exemption or Limited Waiver by the DiMA.¹

DiMA’s first petition (“*Rendering Petition*”) seeks a temporary exemption or waiver until January 1, 2014 from the requirement of rule 79.4(c)(2)(i) that all VPDs enable the rendering of closed captions on all video distributed via IP. DiMA’s second petition (“*User Controls Petition*”) seeks a temporary exemption or waiver until January 1, 2014 from the requirement of rule 79.4(c)(2)(i) that all VPD-provided applications, plug-ins, or devices for viewing video programming comply with the user controls requirements of rule 79.103(c)-(d).

DiMA’s petitions rest on the fallacious premise that the Commission has the authority to exempt an entire class of entities – i.e., VPDs – from the closed captioning rules pursuant to a petition. To reach this premise, DiMA erroneously conflates the two separate bases under which the Commission can grant exemptions to the IP closed captioning rules:

¹ *DiMA Petition*, MB Docket No. 11-154 (May 8, 2012) (“*Rendering Petition*”); *DiMA Petition*, MB Docket No. 11-154 (May 8, 2012) (“*User Controls Petition*”).

- Section 713(c)(2)(D)(ii) of the 1934 Act, which permits the Commission to incorporate *categorical* exemptions into captioning rules promulgated during a *rulemaking*; and
- Section 713(d)(3) of the 1934 Act and associated rule 79.4(d), which permit the Commission to grant *individual* exemptions from its *existing* rules to particular entities.

DiMA's petitions provide no valid basis for the Commission to grant the requested exemptions. DiMA cannot seek an exemption from the Commission's existing rules under section 713(c)(2)(D)(ii) outside of a rulemaking, nor can it seek a categorical exemption for an entire class of entities under section 713(d)(3) and rule 79.4(d)'s process for individual exemption petitions. And DiMA presents no additional evidence sufficient to justify an extraordinary invocation of the Commission's general waiver authority under rule 1.3.

DiMA's petitions attempt to flaunt both the Commission's rulemaking procedure and its rules for individual exemption petitions and general waivers, and tread perilously close to rule 1.52's supportability requirement and prohibition on the interposition of documents for delay.² Accordingly, we urge the Commission to dismiss both of DiMA's petitions with prejudice.

I. DiMA's petitions conflate the standards of review for categorical exemptions by rulemaking and individual exemptions by petition.

DiMA's petitions both assert that the Commission can grant categorical exemptions from the IP captioning rules for entire classes of entities under section 713(c)(2)(D)(ii) of the 1934 Act.³ The petitions assert that new section

² See 47 C.F.R. § 1.52.

³ *Rendering Petition* at 4; *User Controls Petition* at 6; see also *Ex Parte*, DiMA, MB Docket No. 11-154, at 2-3 (June 13, 2012) ("*DiMA Ex Parte*").

79.4(d) of the Commission's rules implements the provisions of section 713(c)(2)(D)(ii).⁴ The petitions then purport to seek exemptions under the requirements of section 79.4(d)(2).⁵

DiMA's assertion that rule 79.4(d)(1) derives from section 713(c)(2)(D)(ii) is patently false. As the Commission made clear in the *IP Captioning Order*, rule 79.4(d)(1) does not derive from section 713(c)(2)(D)(ii), but rather from section 713(d)(3) of the 1934 Act, as amended by section 202(c) of the CVAA.⁶

The distinctions between these two statutory exemption schemes are paramount. Section 713(d)(3) permits the Commission to grant exemptions from its existing closed captioning rules pursuant to a petition, but only to *individual* VPDs on a case-by-case basis.⁷ Conversely, section 713(c)(2)(D)(ii) permits the Commission to promulgate categorical exemptions, but only during a notice-and-comment rulemaking.⁸ And the Commission has specifically held that separate standards apply to each type of exemption.⁹

⁴ *User Controls Petition* at 6 & n.15-16; see *Rendering Petition* at 4 & n. 9-10.

⁵ *Rendering Petition* at 4-5; *User Controls Petition* at 6-7.

⁶ See *Closed Captioning of Internet Protocol-Delivered Video Programming, Report and Order*, 27 FCC Rcd. 787, 825, ¶¶ 62-63 & n.257 (Jan. 13, 2012) (citing 47 U.S.C. § 613(d)(3)) ("*IP Captioning Order*").

⁷ See 47 U.S.C. § 613(d)(3) ("[A] provider of video programming or program owner may petition the Commission for an exemption from the [TV or IP closed captioning rules]" (emphasis added)); *IP Captioning Order*, 27 FCC Rcd. at 825, ¶ 63 ("VPDs and VPOs may petition the Commission on a *case-by-case basis* for a full or partial exemption . . ." (emphasis added)).

⁸ See 47 U.S.C. § 613(c)(2)(D)(ii) ("The *regulations prescribed* under this paragraph . . . *may exempt* . . .") (emphasis added); *IP Captioning Order*, 27 FCC Rcd at 828-30, ¶¶ 67-71 (rejecting commenters' requests for categorical exemptions under section 713(c)(2)(D)(ii) and noting that further exemptions would only be considered in the context of "case-by-case" petitions "filed by a particular . . . person or entity"); see also 47 U.S.C. § 613(d)(1) ("[T]he Commission may exempt *by regulation* programs, classes of programs, or services . . .") (emphasis added).

⁹ See *IP Captioning Order*, 27 FCC Rcd. at 826, ¶ 64.

These distinctions are also clear from the Commission's separate treatment of categorical and individual exemptions from the television closed captioning rules, processes which the Commission noted are "comparable" to the new processes for considering exemptions for IP-delivered programming.¹⁰ As the Commission recently held in the *Anglers Reversal Order*, "[u]nlike the categorical exemptions that are adopted by rulemaking and are of general applicability, the process for determining closed captioning exemptions on the basis of purported undue burden is designed to consider the unique, individual circumstances of each petitioner on a case-by-case basis."¹¹

DiMA, however, invites the Commission to combine the flexibility of the individual exemption process and the breadth of the categorical exemption process without abiding by the mandatory procedural safeguards of the rulemaking process for granting categorical exemptions or requiring the particularized evidence necessary to support an individual exemption. The Commission should decline this invitation, which would lead to an unprecedented miscarriage of administrative process.

Moreover, DiMA's petitions so inextricably and inscrutably conflate categorical and individual considerations of fact and law that it is impossible to determine under which legal standard the Commission should evaluate them.

¹⁰ See *id.* at 825, ¶ 63.

¹¹ *Anglers for Christ Ministries, Inc., Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking*, CG Dockets No. CGB-CC-0005, CGB-CC-0007, 06-181, and 11-175, 26 FCC Rcd 14,941, 14,951, ¶ 19 & n.72 (Oct. 20, 2011) ("*Anglers Reversal Order*") *Closed Captioning and Video Description of Video Programming, Report and Order*, 13 FCC Rcd. 3272, 3314-15, ¶ 202 (Aug. 7, 1997) ("*TV Captioning Order*"). The *TV Captioning Order* noted that individual petitioners are required "to demonstrate burdens that are unanticipated in the generally applicable rules and [categorical] exemptions." 13 FCC Rcd. at 3365, ¶ 202.

The Commission should dismiss the petitions on those grounds alone. But even if the Commission chooses to evaluate DiMA's petitions under the categorical rules, the individual rules, or both, it should reject DiMA's petitions regardless.

II. DiMA's petitions provide no procedurally proper basis for granting categorical exemptions under section 713(c)(2)(D)(ii).

DiMA's petitions both cite to section 713(c)(2)(D)(ii) for the proposition that the Commission has the authority to "exempt any . . . class of service . . . for which the Commission has determined that the application of [the IP captioning] regulations would be economically burdensome" ¹²

The Commission, however, can only grant categorical exemptions to classes of entities pursuant to section 713(c)(2)(D)(ii) as part of a rulemaking. During the IP captioning rulemaking, the Commission considered DiMA's arguments that complying with the rendering and user controls requirements would impose an undue economic burden on VPDs, and rejected them. DiMA was fully on notice that the Commission planned to impose the requirements, and failed to file a timely petition for reconsideration. Accordingly, the possibility that the Commission can exempt VPDs from the rendering and user controls requirements pursuant to section 713(c)(2)(D)(ii) has been fully exhausted.

A. The Commission can only grant categorical exemptions to classes of entities as part of a rulemaking, not by petition.

DiMA's petitions disingenuously omit the full language of section 713(c)(2)(D), which makes clear that only "[t]he *regulations prescribed* under [section 713(c)(2)(A) – requiring the provision of closed captioning on video programming delivered using Internet protocol] . . . may exempt" a class of

¹² *Rendering Petition* at 4; *User Controls Petition* at 6.

service.¹³ This plain and unambiguous language makes clear that section 713(c)(2)(D)(ii) does not grant the Commission authority to issue categorical exemptions from its regulations for classes of entities pursuant to a petition; it merely allows the Commission to include such exemptions *in its regulations* as it prescribes the regulations during the course of a rulemaking.

The Commission made this limit of its authority under section 713(c)(2)(D)(ii) clear in the both the *IP Captioning NPRM* and *Order*.¹⁴ The Commission solicited and considered several commenters' requests for broad categorical exemptions for classes of entities under section 713(c)(2)(D)(ii).¹⁵ But the Commission rejected all the requests, noting that no party had "demonstrate[d] that compliance with the IP captioning requirements would be an economic burden *for an entire category of entities*."¹⁶ The Commission noted that it would only consider further exemptions "on a *case-by-case basis*" pursuant to petitions requesting an exemption . . . filed by a *particular person or entity*"¹⁷

B. The Commission appropriately considered and rejected DiMA's proposal during the IP captioning rulemaking.

Furthermore, the Commission specifically considered DiMA's requests to delay compliance with the rendering and user controls requirements for VPDs during the IP captioning rulemaking – and soundly rejected them. In particular,

¹³ 47 U.S.C. § 713(c)(2)(D)(ii).

¹⁴ See *Closed Captioning of Internet Protocol-Delivered Video Programming, Notice of Proposed Rulemaking*, 26 FCC Rcd. 13,734, 13,750-51, ¶ 32 & n.109 ("IP Captioning NPRM") (distinguishing the process for granting "case-by-case exemptions" under section 713(d)(3) from the process for categorical exemptions under section 713(c)(2)(D)(ii)); *IP Captioning Order*, 27 FCC Rcd. at 829-30, ¶ 70).

¹⁵ *NPRM* at 13,750-51, ¶ 32, *IP Captioning Order*, 27 FCC Rcd. at 829-30, ¶ 70.

¹⁶ *Id.* (emphasis added; internal citation omitted).

¹⁷ *Id.* at 829-30, ¶¶ 69-70 (emphasis added).

DiMA argued at length during the Commission's IP captioning rulemaking that the Commission should grant VPDs "an additional six to twelve months after the latest deadlines it sets for VPOs" to enable VPDs "to test and refine their systems" and "provid[e]" a quality user experience."¹⁸

The Commission acknowledged DiMA's comments but declined to delay its proposed deadlines for VPOs and VPDs.¹⁹ The Commission specifically concluded that DiMA and others commenters requesting delays had "not demonstrated that the deadlines would be problematic on an industry-wide basis."²⁰ The Commission also noted that extending deadlines for VPDs was "not justified because of support for the proposed deadlines in the record and by the VPAAC, which demonstrates that the proposed deadlines appear to be achievable on an industry-wide basis."²¹

C. DiMA received sufficient notice of the Commission's intent to impose deadlines for rendering and user controls.

DiMA now complains that complying with the deadlines for VPDs set forth by the Commission "present significant technical difficulties in the time allotted," feigning surprise that the Commission imposed rendering and user controls obligations on VPDs in rule 79.4(c)(2)(i).²² While DiMA admits that it had fair warning of and does not object to the pass-through obligation for VPDs under rule 79.4(c)(2)(i) in light of the Commission's *NPRM* in this proceeding and the *VPAAC Report*, it nevertheless asserts that "[t]he Commission was not clear

¹⁸ *Comments of Digital Media Association*, MB Docket No. 11-154, at 6-7 (Oct. 18, 2011) ("*DiMA Comments*").

¹⁹ *IP Captioning Order*, 27 FCC Rcd. at 820-21, ¶ 52 & n.221 (citing *DiMA Comments* at 4, 6-7).

²⁰ *Id.*

²¹ *Id.*

²² See *Rendering Petition* at 3; *User Controls Petition* at 5.

during the rulemaking process” that it intended to impose deadlines for VPDs to comply with the rendering obligation.²³ DiMA further claims that “VPD’s [sic] did not know that the FCC would impose such an impossibly short time frame for implementing [user controls].”²⁴

DiMA’s intimation of surprise about the rendering deadlines is flatly contravened by the *VPAAC Report*, the *NPRM*, and DiMA’s own language in the *User Controls Petition*. The VPAAC, of which DiMA was a member, specifically proposed the schedule for deadlines by which “content . . . will require captioning for Internet *distribution* to the end user” and noted that the deadlines “should be interpreted broadly as to include emerging technology and *ways of delivering programming on the Internet*.”²⁵ The VPAAC further noted that its deadlines represented “[a]n agreed-upon schedule for the *implementation of basic captioning . . .*”²⁶ The Commission proposed the VPAAC’s deadlines without modification in the *NPRM*.²⁷ The Commission also proposed in the *NPRM* to “ensure that some or all devices that will be used to access [VPDs’] services will be capable of decoding closed captions when they are available.”²⁸

DiMA specifically acknowledges the VPAAC’s language and the *NPRM* in the *Rendering Petition*, but implies that it understood the obligation of VPDs to distribute captioned Internet programming to refer only to the pass-through and

²³ See *Rendering Petition* at 3, 10.

²⁴ *User Controls Petition* at 5, 14; see also *Comments of the National Association of Broadcasters, Motion Picture Association of America, and National Cable & Telecommunications Association*, MB Docket No. 11-154, at 15-17 (June 6, 2012).

²⁵ First Report of the Video Programming Accessibility Advisory Committee, at 29-30 (July 12, 2011) (“*VPAAC Report*”) (emphasis added).

²⁶ *Id.* at 34.

²⁷ *IP Captioning NPRM*, 26 FCC Rcd. at 13,748-49, ¶ 28 & n.98 (citing *VPAAC Report* at 30).

²⁸ *Id.* at 13,764, ¶ 60.

not the rendering of captions.²⁹ Yet in the *User Controls Petition*, DiMA admits that the typical method of accessing [DiMA members' video] content is for a consumer to use the [applications, plug-ins, or devices] provided by the VPD," which necessarily must render the captions. DiMA thus admits that it was on notice of the rendering requirement.

DiMA also insists that the Commission's deadline for VPDs to include user controls was "unexpected by many VPDs."³⁰ But, as DiMA acknowledges, the VPAAC expressly considered the timeline for VPDs to implement user controls and after failing to reach a consensus, agreed that the issue would "need to be resolved by the FCC through its upcoming NPRM and eventual [Report and Order]."³¹ Accordingly, DiMA cannot reasonably claim that it had no notice the Commission planned to set deadlines for VPDs to implement user controls.

D. DiMA waived its concerns by failing to file a timely petition for reconsideration of the IP Captioning Order.

Even accepting *arguendo* DiMA's implausible contention that it did not receive adequate notice that VPDs would be required to implement caption rendering and user controls pursuant to the Commission's deadlines in the *IP Captioning Order*, DiMA's sole form of recourse was to file a timely petition for reconsideration pursuant to rule 1.429.³² Collateral challenges to rules issued in an order must be presented in a timely petition for reconsideration and cannot be resolved in petitions for exemption from the rules.³³

²⁹ *Rendering Petition* at 3.

³⁰ *User Controls Petition* at 5.

³¹ *Id.*; *VPAAC Report* at 34.

³² See 47 C.F.R. § 1.429.

³³ See, e.g., *In re Junk Fax Protection Act of 2005*, CG Docket No. 05-338, 2012 WL 1548554, *2, at ¶ 6 & n.24 (CGB May 2, 2012) (citations omitted).

Petitions for reconsideration must be filed within 30 days of the publication of an order in the Federal Register.³⁴ The Commission's *IP Captioning Order* was published in the Federal Register on March 30, 2012.³⁵ Accordingly, petitions for reconsideration were due on April 30, 2012.

Despite its objections to the Commission's decisions in the *IP Captioning Order*, DiMA failed to file a petition for reconsideration and thereby waived its right to seek reconsideration. And even assuming that the Commission could reasonably construe DiMA's petitions as petitions for reconsideration of the *IP Captioning Order*, the petitions were not filed until May 8, 2012, more than a week after petitions for reconsideration were due. To whatever extent the petitions seek reconsideration of the Commission's decision to impose caption rendering and user controls obligations on VPDs, they must be dismissed as untimely.³⁶

III. DiMA's petitions provide no grounds for the Commission to grant an individual exemption or exemptions under rule 79.4(d)(1).

DiMA's petitions both state that rule 79.4(d)(1) permits the Commission "may grant to [VPDs] an exemption from the closed captioning rules upon a showing that the requirements" would be economically burdensome.³⁷ The Commission, however, can only grant exemptions by petition under rule 79.4(d)(1) to individual VPDs, not classes of VPDs. DiMA has no apparent authority to petition for an exemption on behalf of any individual VPD, much less all of them, nor does it provide any information about any individual VPD. DiMA does not demonstrate that compliance with the Commission's

³⁴ See 47 C.F.R. § 1.429(d); 47 C.F.R. § 1.4(b)(1).

³⁵ 77 Fed. Reg. 19,480.

³⁶ DiMA concedes in any case that its petitions are not petitions for reconsideration. See *DiMA Ex Parte* at 4.

³⁷ *Rendering Petition* at 4, *User Controls Petition* at 6.

requirements would impose an economic burden on any VPD. Finally, DiMA's proposed exemptions would severely disserve the public interest.

A. The Commission can only grant exemptions by petition to individual VPDs, not classes of VPDs.

As with its incomplete recital of section 713(c)(2)(D)(ii), DiMA disingenuously omits critical language from rule 79.4(d)(1). Rule 79.4(d)(1) does not authorize the Commission to grant blanket exemptions to broad classes of entities, but rather permits "[a] video programming provider or owner" to individually "petition the Commission for a full or partial exemption from the closed captioning requirements" ³⁸ Contrary to DiMA's misguided belief, rule 79.4(d)(1) is precisely derived from section 713(d)(3), which states that "a provider of video programming or program owner may petition the Commission for an exemption from the [closed captioning] requirements" ³⁹

Furthermore, the Commission has repeatedly clarified that rule 79.4(d)(1), articulated in a section of the *IP Captioning Order* entitled "Case-by-Case Exemptions," only permits individual entities to petition for exemptions: ⁴⁰

- The Commission touted rule 79.4(d)(1) as " a process by which VPDs . . . may petition the Commission on a *case-by-case basis*" ⁴¹
- The Commission will only "consider on a *case-by-case basis* petitions requesting an exemption . . . filed by a *particular person or entity*." ⁴²

³⁸ See 47 C.F.R. § 79.4(d)(1) (emphasis added).

³⁹ See 47 U.S.C. § 613(d)(3) (emphasis added); *IP Captioning Order*, 27 FCC Rcd. at 825-26, ¶¶ 62-63 & n.257 (adopting rule 79.4(d)(1) pursuant to 47 U.S.C. § 613(d)(3)). But see *DiMA Ex Parte* at 2 (asserting section 713(d)'s irrelevance).

⁴⁰ *IP Captioning Order*, 27 FCC Rcd. at 824, part III.C.1.

⁴¹ *Id.* at 825, ¶ 63 (emphasis added).

⁴² *Id.* at 830, ¶ 70 (emphasis added).

- “[A]ll VPDs” must comply with the Commission’s captioning rules, “except for *any* VPD that obtains an *individual* exemption”⁴³
- Under rule 79.4(d)(2), which imports the standards for evaluating an exemption petition from section 713(e) of the 1934 Act, the Commission considers “[t]he impact on the operation of *the* video programming *provider or owner*,” “[t]he financial resources of *the* video programming *provider or owner*,” and “[t]he type of operations of *the* video programming *provider or owner*.”⁴⁴
- The Commission promulgated rule 79.4(d)(3), stating that it “will evaluate economic burden with regard to the *individual* outlet” by “examin[ing] the overall budget and revenues of the *individual* outlet and not simply the resources *it* chooses to devote”⁴⁵

There can be no doubt that Congress and the Commission intended section 713(d)(3) and rule 79.4(d)(1) to facilitate only individual, case-by-case exemptions from the captioning rules pursuant to petitions, and not blanket exemptions for entire classes of entities. But DiMA fails to show that it has the authority to petition for an exemption on behalf of any, much less every, individual VPD.

B. DiMA has no authority to petition for an exemption on behalf of any, much less every, individual VPD.

DiMA’s petitions seek exemptions from the closed captioning rules for all VPDs “that do not currently provide closed captioning” from the rendering requirements of rule 79.4(c)(2)(i) and for *all* VPDs from the user controls

⁴³ *Id.* at 829-30, ¶¶ 69-70 (emphasis added).

⁴⁴ 47 C.F.R. § 79.4(d)(2)(ii)-(iv) (emphasis added); *IP Captioning Order*, 27 FCC Rcd. at 825-26, ¶ 63

⁴⁵ 47 C.F.R. § 79.4(d)(3) (emphasis added); *IP Captioning Order*, 27 FCC Rcd. at 827, ¶ 65 (emphasis added).

requirements of rule 79.4(c)(2)(i).⁴⁶ Because DiMA asserts that the Commission should grant the requested exemptions under rule 79.4(d)(1), it must present sufficient evidence that the petitioned-for exemptions are warranted for each and every VPD included within the scope of DiMA's requests.

It is a basic tenet of administrative procedure that only an individual who is "authorized to represent the particular person in whose behalf he acts" may "represent a person before an agency."⁴⁷ And the Commission specifically requires "[a]ny person, in a representative capacity, transacting business with the Commission" to show his or her authority to act in such capacity.⁴⁸

DiMA, however, does not represent that it has the requisite authority to file individual exemption petitions on behalf of every VPD subject to the Commission's jurisdiction. In fact, DiMA's petitions reveal that it does not even have the authority to file individual exemption petitions on behalf of all its own members. Apple Inc. and Google both explicitly refused to join the *Rendering Petition*, and Google refused to join the *User Controls Petition*.⁴⁹

Moreover, DiMA does not identify any DiMA member that has specifically authorized DiMA to seek individual exemptions on the member's behalf, nor does DiMA provide any particularized evidence relating to the economic circumstances of any particular member. None of DiMA's members specifically sign on to or verify either of DiMA's petitions. Finally, DiMA does not assert that it is itself a VPD and thereby qualified to petition for an exemption.

DiMA's petitions must be dismissed under rule 79.4(d)(1) because the petitions do not identify any particular VPD that is seeking an exemption and

⁴⁶ *Rendering Petition* at 1; *User Controls Petition* at 1.

⁴⁷ See 5 U.S.C. § 500(b).

⁴⁸ See 47 C.F.R. § 1.22.

⁴⁹ *Rendering Petition* at 1 & n.3; *User Controls Petition* at 1 & n.3.

because DiMA is not a VPD eligible to seek an exemption. Should the Commission nevertheless construe DiMA's petitions to be seeking exemptions for all of DiMA's members other than those who refused to sign on to one or both of the petitions or some other set of specific VPDs, the petitions must nevertheless fail because they do not meet the Commission's standards for exemption under section 713(d)(3) and rule 79.4(d)(2).

C. DiMA provides no information about any individual VPD.

Pursuant to section 713(d)(3) and rule 79.4(d)(2), a petitioner must support an individual exemption petition "with sufficient evidence to demonstrate that compliance with the [closed captioning] requirements" would be "economically burdensome."⁵⁰ Pursuant to rule 79.4(d)(3), the Commission must "evaluate economic burden with regard to the *individual* outlet," or VPD.⁵¹ And the Commission specifically "clarif[ied] that when a VPD seeks an economic burden exemption from the [rendering or user control] requirements [for VPD-provided applications, plugins, and devices], we will consider the exemption petition with regard to the *specific feature(s) and device(s)* for which implementing the captions purportedly would be economically burdensome."⁵²

DiMA's petitions do not identify any specific applications, plug-ins, or devices for which complying with the rendering and user controls deadlines would be economically burdensome. The petitions do not even identify any specific VPDs for whom complying with the deadlines would be economically burdensome across all applications, plug-ins or devices provided by the VPD.

⁵⁰ 47 C.F.R. § 79.4(d)(2); *see* 47 U.S.C. § 713(d)(3).

⁵¹ 47 C.F.R. § 79.4(d)(3) (emphasis added).

⁵² *IP Captioning Order*, 27 FCC Rcd. at 821, ¶ 53 & n.229.

Instead, DiMA offers a series of unverifiable platitudes that purportedly apply across the board to broad classes of VPDs and all VPD-provided devices.⁵³

It is absurd and unfair for DiMA to ask the Commission and the public to evaluate whether meeting the Commission's rendering deadlines would be economically burdensome to literally every entity in the broad, unbounded classes of VPDs it proposes. And as the Commission held in the *Anglers Reversal Order*, it is wholly inappropriate to presume without specific evidence that the closed captioning rules might affect classes of petitioners in the same way.⁵⁴

While it may be the case that certain VPDs have particular economic circumstances that might warrant a delay in compliance deadlines for particular features on particular devices, it is impossible to derive any information that would aid that inquiry from the vague, non-specific assertions in DiMA's petitions. And even if the Commission could do so, DiMA's assertions would fail to rise to the stringent requirements for granting an individualized exemption.

D. DiMA fails to demonstrate that compliance would constitute an economic burden for any VPD.

In evaluating individual exemption petitions under rule 79.4(d), the Commission must consider the factors set forth in section 713(e) of the 1934 Act:

1. [T]he nature and cost of the closed captions for the programming;
2. [T]he impact on the operation of the provider or program owner;
3. [T]he financial resources of the provider or program owner; and
4. [T]he type of operations of the provider or program owner.⁵⁵

⁵³ *Rendering Petition* at 1; *User Controls Petition* at 1.

⁵⁴ *Anglers Reversal Order*, 26 FCC Rcd. at 14,951, ¶ 19

⁵⁵ See 47 U.S.C. § 613(e); 47 C.F.R. § 79.4(d)(2); *IP Captioning Order*, 27 FCC Rcd. at 824, 825-26, ¶¶ 61, 63.

DiMA's petition fails to establish that any of these factors weigh in favor of granting either of its proposed exemptions for even a single individual VPD, much less the broad classes of VPDs covered by DiMA's requested exemptions.

1. Nature and cost of closed captions

The Commission has held that a petitioner must verify that it has obtained information about the reasonable costs it would actually incur to comply with its captioning obligations, including estimates for providing captioning services internally or price quotes from obtaining third-party captioning services.⁵⁶ Rather than provide any specific information about the actual cost of captions, DiMA asserts that VPDs literally cannot comply with the Commission's rendering and user controls obligations because:

- VPDs cannot hire enough programmers to implement the features required for compliance;
- Implementing the features by the deadlines would somehow be "counter-productive," and "perhaps even harmful"; and
- Testing new captioning software requires more than six months.⁵⁷

These claims are so vague, unspecific, and unsupported that they are impossible to evaluate in the abstract. For example, DiMA provides no

⁵⁶ See *Anglers Reversal*, 26 FCC Rcd. at 14,951-52, ¶ 20 & n.100.

⁵⁷ See *Rendering Petition* at 6; *User Controls Petition* at 9. DiMA additionally suggests that implementing user controls will be especially complicated because there are "literally millions of combinations" of user controls that a VPD must specifically account for. *User Controls Petition* at 8. But this suggestion absurdly implies that a VPD must specifically and individually address every possible combination of user controls, as though it would present the user with a menu of millions of options to select from. There is no reason to assume that VPDs would undertake this unprecedented and bizarre approach to user interface design rather than simply designing a menu that allows the user to adjust each of the ten options set forth in rule 79.103(c) individually.

information about how many engineers and programmers any particular VPD, or even VPDs in the abstract, already employ to implement accessibility features. DiMA provides no documentation of efforts to hire engineers to implement accessibility features or any inability to do so. DiMA provides no affidavits from credible engineering or programming experts explaining in detail how it is literally impossible to implement straightforward and well-specified accessibility features. DiMA offers no documentation of software engineering or testing plans that suggest how much, if any, progress any VPDs have made toward implementing rendering and user controls features since President Obama signed the CVAA into law in October 2010, nor any evidence supporting that any particular VPD cannot possibly implement the features on *any* device until 2014.

The only tangible, verifiable evidence in DiMA's petition regarding the actual difficulty of complying with the Commission's rendering and user controls deadlines is that DiMA's *own members* do not believe they will have difficulty meeting the deadlines. More specifically, it is clear that neither Apple nor Google believe that complying with the Commission's rendering deadline will pose an undue economic burden, and similarly that Google does not believe that complying with the Commission's user controls deadline will impose an undue economic burden. Moreover, the Motion Picture Association of America, National Cable & Telecommunications Association, and the National Association of Broadcasters, who presumably represent a large proportion of VPDs, "[expect] to be able to provide programming with basic captioning" pursuant to the Commission's deadlines.⁵⁸ Thus, DiMA's assertion that complying with the deadlines will be literally impossible on an industry-wide basis for all devices,

⁵⁸ *Notice of Ex Parte, Disney*, MB Docket No. 11-154 (June 12, 2012).

plug-ins, and applications is demonstrably false, and DiMA provides no evidence to suggest that it will be true for any particular VPD or device.

2. Operational impact

The Commission has held that a petitioner must provide substantial evidence that compliance will impact “the petitioner’s programming activities—for example, the extent to which programming might not be shown”⁵⁹ DiMA merely insists without explanation that compliance will “[impose] significant difficulty on the affected VPDs,” without specifying anything about the nature of the difficulty or how it will impact any VPD’s programming-related activities.⁶⁰

3. Financial resources

The Commission has held that a petitioner must provide detailed documentation of its financial status to demonstrate its inability to afford closed captioning, including finances and assets, gross or net proceeds, and any efforts the petitioner has engaged in to secure sponsorships, assistance from its programming partners, or other alternative sources of funding to comply with its captioning obligations.⁶¹ DiMA does not contend that its members do not have substantial financial resources. Indeed, many of DiMA’s members are among the world’s largest, richest, and most powerful companies and have vast resources that can be leveraged to achieve compliance. For example, Apple has more than \$116 billion in assets and brings in more than \$25 billion in annual profits,⁶² and Microsoft has more than \$108 billion in assets and \$23 billion in annual profits.⁶³

⁵⁹ *Anglers Reversal*, 26 FCC Rcd. at 14,951-52, ¶ 20

⁶⁰ *Rendering Petition* at 9; *User Controls Petition* at 10.

⁶¹ *Anglers Reversal*, 26 FCC Rcd. at 14,951-52, ¶ 20

⁶² Fortune 500, Apple, <http://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/670.html> (last visited June 14, 2012).

⁶³ Fortune 500, Microsoft, <http://money.cnn.com/magazines/fortune/fortune500/2012/snapshots/3063.html> (last visited June 14, 2012). Many other

DiMA incredibly suggests, however, that the financial resources of VPDs are “not directly relevant” to their ability to comply with their captioning obligations.⁶⁴ Not only does this suggestion flatly contradict the requirements of section 713(e) and the Commission’s precedent, it strains all credibility to suggest that companies with billions of dollars in assets and annual revenue cannot achieve even partial compliance with the Commission’s deadlines by September 30, 2012, nearly two years after the CVAA was signed into law.

4. Type of operation

Finally, DiMA does not even attempt to suggest that VPDs have similar types of operation that would support a determination that complying with the Commission’s deadlines would impose an economic burden on VPDs as a class. Instead, DiMA simply admits that “VPDs vary in size and reach and encompass a range of companies and business models.”⁶⁵

E. DiMA provides no additional justification for its exemptions.

In addition to providing evidence under the four factors in section 713(e), a petitioner must also “describe any other factors it deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the IP closed captioning requirements.”⁶⁶

DiMA first suggests that its proposed exemptions are warranted because the Commission is regulating some VPDs for the first time and because some VPDs have never provided closed captions before.⁶⁷ DiMA does not explain, nor is it clear, why this reality would justify a delay in compliance, given that the

DiMA members are similarly situated.

⁶⁴ *Rendering Petition* at 9; *see User Controls Petition* at 11.

⁶⁵ *User Controls Petition* at 11.

⁶⁶ 47 C.F.R. § 79.4(d)(3); *IP Captioning Order*, 27 FCC Rcd. at 825-26, ¶ 63.

⁶⁷ *Rendering Petition* at 10, 11-12; *User Controls Petition* at 12, 15.

Commission specifically considered and accounted for the nascent nature of providing captions for IP-delivered content when proposing the deadlines.⁶⁸

Second, DiMA suggests that the Commission's compliance deadlines were unforeseeable by VPDs.⁶⁹ As discussed above, VPDs received sufficient notice of the Commission's intent to impose the compliance deadlines throughout the Commission's rulemaking and as a result of discussions during the creation of the *VPAAC Report*.⁷⁰ And if DiMA believed that VPDs did not receive sufficient notice or that the rulemaking was otherwise deficient, it could have filed a timely petition for reconsideration.⁷¹ DiMA cannot now justify its attempt to abuse the exemption process by pointing to its failure to file a petition for reconsideration.

Finally, DiMA argues that VPDs should have the same compliance deadlines as apparatus manufacturers, insisting without explanation that "[t]he public interest is served by all parties in the online video industry addressing the Commission's rules at the same time."⁷² It is wholly unclear from DiMA's petition what impact requiring consistency between the rules for video distributors and apparatus manufacturers would have on the public interest—other than delaying the availability of accessible video programming for nearly a year and a half. And DiMA does not explain why the unexplained merits of consistency do not counsel in favor of requiring non-VPD apparatus

⁶⁸ E.g., *IP Captioning Order*, 27 FCC Rcd. at 788, ¶ 1 ("Prior to the adoption of the CVAA, the [1934 Act did not require] the use of closed captioning . . . on IP-delivered video programming [But w]e believe [the] benefits of our rules to deaf or hard of consumers will outweigh the affected entities' costs of compliance.") (internal citations omitted).

⁶⁹ *Rendering Petition* at 10; *User Controls Petition* at 13-14.

⁷⁰ See discussion *supra*, Part II.C.

⁷¹ *Id.*

⁷² *Rendering Petition* at 11.

manufacturers to meet the shorter deadlines imposed on VPDs, rather than the other way around. Consumer Groups argued for just such a result in earlier comments, but concede that to do so now that the rulemaking is over would be procedurally improper, just like the entirety of DiMA's petitions.⁷³

F. DiMA's proposed exemptions would disserve the public interest.

Finally, DiMA fails to address the substantial adverse impact that granting its proposed exemptions would have on the public interest. As DiMA acknowledges in the *User Controls Petition*, "the typical method of accessing [IP-delivered video] content is for a consumer to use the products provided by the VPD" rather than using other devices that render captions passed through by a VPD.⁷⁴ In other words, the pass-through obligations of VPDs are effectively non-existent because nearly all VPDs require users to use some type of VPD-provided software to access their content.

Accordingly, delaying the rendering obligations of VPDs from September 30, 2012 to January 1, 2014 would effectively ensure that VPDs would not have to make any content accessible until then. This would flatly contravene the widespread consensus of the industry and consumer representatives of VPAAC, including DiMA, who all agreed that VPDs would have no trouble making content accessible according to the September 30, 2012 deadline for prerecorded, unedited content and subsequent deadlines of March 30, 2012 for live and near-live content and September 30, 2013 deadline for prerecorded, edited content.⁷⁵

⁷³ *Comments of TDI, et al.*, MB Docket No. 11-154 at 50, (Oct. 18, 2011) ("*Consumer Groups Comments*").

⁷⁴ *User Controls Petition* at 5.

⁷⁵ *VPAAC Report* at 30.

The Commission appropriately deferred to the VPAAC's consensus in the *IP Captioning Order*.⁷⁶

There is simply no evidence in the record to suggest satisfying the Commission's rendering requirements is unduly burdensome on any VPD, particularly given DiMA's admission that nearly all VPDs subject to the Commission's requirements already implement video streaming technology and playback features to deliver video programming via IP. In this light, it is clear that the *Rendering Petition* is little more than a procedurally improper, bad-faith effort to undo years of consensus-building and compromise for the sake of inexplicable delay, all at the expense of the millions of consumers who are deaf or hard of hearing who have patiently waited for ubiquitously accessible video programming for decades.

Moreover, DiMA's own *User Controls Petition* specifically emphasizes the importance of VPDs complying with the rendering deadlines.⁷⁷ In stark contrast to the *Rendering Petition*, the *User Controls Petition* notes that the impact of delaying compliance with the user controls deadlines would be significantly reduced if VPDs complied with the rendering deadlines by distributing programming to consumers with CEA-608 compliant captions.⁷⁸ The contradiction between DiMA's petitions underscores the significant harm to consumers and the public interest that would result if all VPDs were granted exemptions from the rendering deadlines.

Finally, while we agree that it would be preferable for programming to be distributed with basic CEA-608 captions rather than with no captions at all, the

⁷⁶ *IP Captioning Order*, 27 FCC Rcd. at 820-21, ¶ 51.

⁷⁷ *User Controls Petition* at 16.

⁷⁸ Compare *id.* with *Rendering Petition* at 14-15.

deep importance of the user controls requirements of rule 79.103(c) has been well-established in the record of this proceeding.⁷⁹ In particular, it is essential that the color, opacity, size, font, and background of captions be adjustable to ensure that consumers are able to tailor the captions to their specific needs and ensure that the captions are readable. For consumers who are deaf-blind or who are hard of hearing and are visually impaired, these user controls are not mere “bells and whistles,”⁸⁰ but frequently make the difference between content being accessible and not. If VPDs do not provide user controls in compliance with rule 79.103(c), then large segments of Americans who are deaf or hard of hearing will be denied the important civil rights afforded by the CVAA.

DiMA’s requested exemptions would severely harm the public interest. Because DiMA also fails to establish that the Commission’s rules would impose an undue economic burden on any particular VPD, its petitions must be rejected.

IV. DiMA’s petitions do not warrant an extraordinary exercise of the Commission’s general waiver authority under rule 1.3.

Finally, DiMA’s petitions both argue that the Commission should exercise its general waiver authority under rule 1.3 to waive its rules to temporarily waive the rendering and user controls requirements of rule 79.4(c)(2)(i).⁸¹ Courts, however, have acknowledged the extraordinary rarity of circumstances that warrant the Commission’s grant of general waivers; indeed, a waiver applicant “faces a high hurdle even at the starting gate.”⁸²

Accordingly, the Commission can only grant a waiver under rule 1.3 where a petitioner clearly presents specific facts particular to the petitioner’s situation

⁷⁹ E.g., *IP Captioning Order* at 850-51, ¶ 109.

⁸⁰ See *Comments of DIRECTV, LLC*, MB Docket No. 11-154, at 2 (June 4, 2012).

⁸¹ *Rendering Petition* at 12-15; *User Controls Petition* at 16-19.

⁸² E.g., *WAIT Radio v. FCC*, 481 F.2d 1153, 1157 (D.C. Cir. 1969).

that render strict enforcement of a rule inconsistent with the public interest.⁸³ In particular, the Commission can only properly exercise its general waiver authority in the rare case that both (1) special circumstances warrant a deviation from the general rule and (2) a deviation will serve the public interest.⁸⁴

It is unclear how the Commission could ever exercise its authority under rule 1.3 to waive the captioning waivers in a situation where a VPD was *not* eligible for either a categorical or individual waiver from the rules. As discussed above, the individual waiver process requires the Commission to specifically consider (1) whether a petitioner's specific circumstances warrant permitting the petitioner to deviate from the captioning rules, and (2) whether permitting such a deviation would serve the public interest.⁸⁵

In other words, rules 1.3 and 79.4(d) wholly overlap; a determination that a petitioner is not eligible for an exemption pursuant 79.4(d) necessarily precludes the petitioner's eligibility for a waiver under rule 1.3. DiMA even admits as much, arguing that the factors underpinning section 713(d)(3) and rule 79.4(d) are essentially the same as the "special circumstances" warranting a waiver.⁸⁶ Moreover, DiMA's arguments for invoking rule 1.3 are entirely duplicative of its arguments for invoking rule 79.4(d); DiMA even specifically incorporates its arguments under rule 79.4(d) by reference.⁸⁷

Because DiMA has not established pursuant to section 713(d)(3) and rule 79.4(d) that specific circumstances exist warranting an exemption from the rendering and user controls or that exempting VPDs from those rules would

⁸³ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁸⁴ *Id.*

⁸⁵ See discussion *supra* at III.D.

⁸⁶ *Rendering Petition* at 13; *User Controls Petition* at 17.

⁸⁷ *Rendering Petition* at 13; *User Controls Petition* at 17.

serve the public interest, it cannot somehow establish those same circumstances under rule 1.3, particularly where it has not identified any specific circumstances or public interest impacts that are relevant under rule 1.3 but not under rule 79.4. Accordingly, we encourage the Commission to reject DiMA's specious contention that rule 1.3 provides additional grounds for the Commission to waive its closed captioning rules above and beyond the Commission's authority to grant individual exemptions from the rules.

CONCLUSION

DiMA's petitions provide no cognizable basis for the Commission to grant the requested exemptions. DiMA cannot seek an exemption from the Commission's existing rules under section 713(c)(2)(D)(ii) outside of the context of a rulemaking, nor can it seek a categorical exemption for an entire class of entities under section 713(d)(3)'s process for individual exemption petitions. And DiMA presents no additional evidence sufficient to justify an extraordinary invocation of the Commission's general waiver authority under rule 1.3. Accordingly, we urge the Commission in the strongest possible terms to dismiss both of DiMA's petitions with prejudice.

Respectfully submitted,

/s/

Blake E. Reid, Esq.[†]

Counsel to Telecommunications for the
Deaf and Hard of Hearing, Inc. (TDI)

June 15, 2012

[†] Counsel thanks Georgetown Law student Chris Poile for her assistance in preparing this opposition.

CERTIFICATION

Pursuant to 47 C.F.R. §§ 1.16 & 79.4(d)(9), I, Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied in the foregoing opposition, these facts and considerations are true and correct to the best of my knowledge.

A handwritten signature in black ink that reads "Claude L. Stout". The signature is written in a cursive style with a large, looped "C" and a distinct "L".

Claude Stout
June 15, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 15, 2012, pursuant to 47 C.F.R. § 79.4(d)(7), a copy of the foregoing Opposition was served by first class U.S. mail, postage prepaid, upon the petitioner:

Lee Knife, Executive Director
Digital Media Association
1050 17th Street NW, Suite 220
Washington, DC 20036

Respectfully submitted,

/s/

Niko Perazich

June 15, 2012